NO. 22553

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH WAYNE CLEAVER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On appeal from the United States District Court for the District of Arizona

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

Appellant, now released on bond pending appeal, was indicted under 21 U.S.C. 176a and 18 U.S.C. 545 (C.T. 4-5) and, following an unsuccessful motion to suppress, was tried and convicted. The District Court had jurisdiction under 18 U.S.C. 3231. A timely notice of appeal was filed (C.T. 38), giving this Court jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant, who is on release pending appeal, was convicted on a two-count indictment charging, respectively, violations of 21 U.S.C. 176a (receiving, concealing, and facilitating the transportation and concealment of unlawfully imported marijuana) and 18 U.S.C. 545 (unlawfully importing benzedrine tablets), and was sentenced to imprisonment for a period of 5 years on Count I and, concurrently, to a term of two years on Count II. This appeal is based upon the lower court's failure to suppress the marijuana and benzedrine tablets found by Customs officials when, 12 miles north of the Mexican border, the officials stopped the vehicle in which appellant and two other young men, Black and Stewart, were riding.

At the hearing on appellant's pre-trial motion ("M" will be used to refer to the Motion transcript and "T" to refer to the Trial transcript), the Government conceded that, owing to the significant gaps in surveillance, the search in question could not be sustained on border search grounds (M.4); accordingly, the Government undertook the burden of establishing probable cause (M.5). The relevant facts follow:

While at home in Nogales, Arizona at approximately 10 p.m. on the night of July 12, 1967, Turner, a Customs Port Investigator (M.14), received a telephone call from Customs Inspector Larson, who was stationed at the Grand Avenue Port of Entry (M.14). Larson said he had received a call from an informant in Nogales, Sonora, Mexico, who stated that three white American males, two wearing green Army jackets, one wearing a black shirt or sweater, and one or more wearing levis, were in Mexico trying to purchase marijuana (M.7, 18, 27). Nothing was said about the age of the three (M.30-31), about their height and weight (M.18) or about where in the Mexican city they were (M.17), and the informant apparently did not indicate the basis for his conclusion that three Americans were attempting to buy marijuana. Larson told Turner the informer's name (M.7) and Turner recognized the name of the man as one who had provided information some 20-25 times (M.76) over the past 11 or 12 months (M.14-15), the information proving to be reliable in approximately 60% of the cases (M.72, 76).

Turner went immediately to the Port of Entry, called Agent Washington, and asked Washington to meet him at the Port. (M.16, 46). When Washington arrived, Turner told him

of the call Larson had received (M.46); Washington remained at the Gate while Turner went into Mexico to investigate (M.46). When Turner had been in Mexico for about 15 minutes (at about 10:30 p.m.) (M.18-19), the informant again called the Port. Speaking to Washington, the informant said, "They have jumped the fence up by the cemetery, by the Mexican cemetery with a bag of marijuana" (M.47). Washington recognized the voice of the informant as the same person that had called Larson (M.47) and Washington immediately established radio contact with Turner and told him of the message (M.48,8). Neither Washington nor Turner personally saw anyone jump the fence (M.20, 31), and the informant did not say that he saw the young men cross the border, nor did he disclose any underlying facts or circumstances that led him to conclude that they had done so (M.47; see also M.76-77).

As a result of the radio message from Agent Washington, Turner returned to the United States (M.8) and proceeded to the end of the chain link fence, which is three miles west of town, in pursuit of the men (M.66). Finding no sign of them, Turner returned to Mexico in an attempt to locate the informer; he did so, and the informer told him the men had been dealing with a certain individual, that they had a bag, and that they

had crossed the fence (M.66).

The informer did not tell Turner there had been a buy from the individual--only that the men had contacted him (M.68-69). He did not say that he personally observed a sale or even a suspected transaction between the individual and the Americans, or that he had spoken with that man (M.69-70)[1]-- and Turner did not seek to discover the facts upon which the informant based his conclusion that the three men had been in contact with the individual (M.76-77). The informant did not say that he personally saw the men go over the fence, and again Turner did not ask about the basis for the informant's conclusion (M.76-77). Nor did the informant indicate whether he himself had a different source of information regarding the supposed sale and regarding the fence crossing, and Turner did not go into that with him (M.76-77).

After speaking with the informer, Turner returned to the United States, and this time drove west on International Street, which parallels the international fence for approximately one mile (M.66-67; M-9; T-23), and which then leads

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[1]Although Turner suspected that individual to be a seller of narcotics, Turner never had any personal contact with him, and he was not an informer for the Customs Office (M.69).

to a path passable by pedestrians (M.21). As he drove into the area, Turner noticed two young men near the end of the road walking east towards town (M.66-67; M.9).

One of the young men was wearing an olive Army jacket, the other a black sweater (M.9). Turner came within three feet of the two and could see them rather clearly (M.23-24); although it had rained earlier in the evening, he did not notice any dirt or moisture on their clothing (M.25), and did not think they were walking in a suspicious manner (M.25, 39). The area along International Street is residential, with houses extending all the way to the west end of the street (M.38; T.39). There are six houses in the immediate vicinity (T.53, 54, 68).[2]

Turner, in his unmarked car with a 5-foot police radio aerial (M.23-24), drove right past the two men, proceeded to the west end of International Street, turned around, drove past the men again, parked his car somewhat further east, and got out of his car in order to follow the men on foot. (M.23, M.9; T.24). He followed them for about five blocks (M.9)

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[2]On the Mexican side of the fence is a street with houses and quite a bit of light (T.68-69).

through a very well lighted and heavily populated area (T.73-76); they were walking on the sidewalks in an average manner and were not carrying anything (T.73-76).

Next, the two men entered a red Falcon Ranchero bearing California plates, and drove off (M.10). Turner lost surveillance for approximately a minute (M.40-41) while he ran back to his own car, but then followed the Ranchero, which returned to the area near the fence (M.10). For a period of about four minutes, during which time the Ranchero was stopped in a residential area (M.43) near the fence, Turner, who was 1/2 mile away from the Ranchero (M.43), lost sight of it and could see only reflections of light (M.42; T.26). Then, the Ranchero drove back past Turner (M.10), and he noticed that there were then three persons in it--but he saw merely three heads and could not recognize any of the three persons (M.34; T.26, 57-58). Turner followed the Ranchero for a few blocks, but when it turned south, Turner proceeded north on Grand Avenue to a spot where Agent Washington and Agent-in-Charge Cameron were waiting (M.48, 50; T.27).

No agent took up surveillance of the Ranchero when Turner left it (M.11, 36-37; T.27), and it was not again seen until some 10-15 minutes later when Agent Swindler--a Customs Agent

stationed slightly south of the spot where Washington, Turner and Cameron were waiting (M.85)--noticed the Ranchero pass him going north (M.49). Swindler alerted Washington (M.49), and Washington and Cameron followed the vehicle in Washington's car (M.50). Turner apparently followed the Ranchero in his own car (M.11, 37), as did Swindler (M.85-86).

After driving for approximately one mile, the Ranchero made a U-turn and parked in front of a closed Richfield Station at the curb of a main street which had traffic even at that time of night (M.11; T.96-98). The agents all continued north for a short while and then pulled off the highway to wait (M.11, 50, 85-86). After a while, Swindler returned south to investigate and drove past the service station where he noticed the three men standing near the soda machine. In a few minutes, Swindler was contacted by the other agents and was told that the Ranchero was again proceeding north (M.86). The Ranchero had been free from surveillance for 15-20 minutes while parked at the Richfield Station (M.37). Swindler, upon request of the agents (M.86), went to the service station to see if anything had been left there; he discovered nothing, reported that to Washington and Cameron, and then drove north and caught up with the vehicles driven by his colleagues (M.86).

The Ranchero was stopped by Agents Washington and Cameron 12 miles north of Nogales, Arizona (M.12). When he stopped the vehicle, Washington knew only that there were three persons in it--he could not see or identify the occupants or their clothing (M.59-60). All three men were in shirtsleeves when stopped (M.39;T.34). Stewart was driving (M.13). A search that followed the stopping of the vehicle revealed the marijuana and the benzedrine tablets (T.30) that were the subject of the motion to suppress.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in failing to suppress evidence obtained from appellant pursuant to a search which was not a border search and which was not based on probable cause.

QUESTIONS PRESENTED

1. Whether a search 12 miles from the Mexican border can be sustained as a border search where surveillance was not continuous and where the Customs officials had neither actual knowledge nor probable cause to believe that appellant had crossed the international border.

2. Whether there was probable cause for a search where Customs officials acted upon an informant's communication but were not informed of the facts and circumstances which led the informant to conclude that three men had crossed the border carrying marijuana.

SUMMARY OF ARGUMENT

Appellant's conviction must be reversed because of the lower court's failure to suppress evidence obtained from appellant in a search conducted several miles from the international border which cannot be sustained as a border search and which was not based on probable cause.

As the Government correctly conceded below, the search in question was not a border search. A border search will not be found unless there is virtually continuous surveillance from the time of border crossing until the time of search. Leeks v. United States, 356 F.2d 470, 471 (9th Cir. 1966); King v. United States, 348 F.2d 814, 816 (9th Cir. 1965). But in the present case, the officers who stopped appellant were not certain that he was the same person who they suspected had crossed the border, and, in addition, appellant was not under surveillance for some forty minutes during the two-hour period from when he was first seen until he was stopped. Moreover, no Customs official or informant saw appellant cross the international border, and the officials, who relied on the bare conclusory statement of an informant, did not even have probable cause to believe that such a crossing took place. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct.

1509 (1964). Thus the search cannot be classified as a border search.

Nor was the search based on probable cause. A 60% reliable informant told the Customs officials that three men had crossed the fence carrying marijuana. But since the informant did not disclose the facts and circumstances underlying his conclusion, the officials clearly could not have obtained a warrant in this case. Aguilar v. Texas, supra. And since the requirements for proceeding without a warrant are at least as high--and probably higher--than the requirements for proceeding with a warrant, the warrantless action of the Customs officials was in plain violation of the Fourth Amendment, and the resulting evidence should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 479-80 (1963); Beck v. Ohio, 379 U.S. 89, 96 (1964); United States v. Soyka, No. 31583 (2d Cir., decided June 18, 1968).

ARGUMENT

I. The search 12 miles from the Mexican border cannot be sustained as a border search where there were significant gaps in surveillance and where the Customs officials had neither actual knowledge nor probable cause to believe that appellant had crossed the international border.

At the hearing on the motion to suppress, the Government properly conceded that the gaps in surveillance preceding the search at issue foreclosed the possibility of classifying the search as a "border search" (M.4). That concession was clearly called for: Before invoking the label "border search" to condone a search based on mere suspicion, this Court has rightly and repeatedly required a showing of virtually continuous surveillance from the time of border crossing until the time of search. Leeks v. United States, 356 F.2d 470, 471 (9th Cir. 1966);[3] King v. United States, 348 F.2d 814, 816

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[3] "The enterprise of officers 'tailing' Leeks was continuous from the time Leeks crossed the border until he was stopped by the command of Customs officers. (There was a shift in who pursued Leeks, brought about by intercommunication of officers over their radios). Although there was a period when Leeks, as he drove, may have been momentarily out of the sight of all of the officers, there was no breach in the continuity of the project of the officers following him." (Emphasis supplied).

(9th Cir. 1965).[4] See also Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967); Alexander v. United States, 362 F.2d 379 (9th Cir. 1966); Contreras v. United States, 291 F.2d 63 (9th Cir. 1961). The undisputed facts of the instant case plainly establish the absence of the requisite surveillance.

It will be recalled that when Agent Turner followed the two young men, they entered a Ranchero, drove west on International Street, and stopped for a period of approximately four minutes. During that four-minute period, Turner was 1/2 mile away from the Ranchero and lost sight of it (M.42-43). While that time period is admittedly short, it is nevertheless significant, for when the Ranchero returned from that spot, it had three occupants--none of whom was ever again recognized by Turner or any other official until the vehicle was eventually stopped (M.34, 59-60; T.26, 57-58)! That gap in surveillance should itself defeat a border search, for the

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[4] "We hold that where, as here, duly authorized officers receive information that a person or vehicle is about to cross the border with contraband in violation of the laws of the United States, and where shortly thereafter a person or vehicle conforming substantially to the description thereof given to such officers is seen to cross the border, and where such person or vehicle is followed therefrom by said officers and kept under surveillance until stopped and searched, ... such search may be held to be a border search." (Emphasis supplied).

agents knew the Ranchero had not been in Mexico and, because of the inadequate surveillance, the agents had no way of knowing whether the persons they stopped were the same persons who had allegedly been in Mexico.

Furthermore, the above gap in surveillance does not stand alone. Equally significant is the fact that after the Ranchero left International Street with three occupants, no one kept the vehicle under surveillance, and it was out of sight for perhaps 15 minutes (M.11, 36-37, 49; T.27). And, just a short time later, when the vehicle made a U-turn and parked at the Richfield Station, surveillance stopped for about 20 minutes (M.37). In other words, during the two-hour period from when the men were first seen until they were stopped, they were out of sight for about forty minutes.[5]

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[5]The two-hour time period--from 10:45 p.m. to 12:45 a.m.--is an approximate calculation. At 10:30 p.m., Turner was in Mexico and received a call from Agent Washington that three men had jumped the fence. He went into the United States, found nothing, returned to Mexico to find the informer, again returned to the United States, and then first spotted the two men walking. It can be safely assumed that at least 15 minutes elapsed in the interim. At 12:15 a.m., the Ranchero was seen leaving the city (M.85). It parked for approximately 20 minutes at the Richfield Station, and was then stopped on a highway 11 miles from town. That time would be approximately 12:45 a.m.

Under such circumstances, a border search cannot be sustained.

There exists still another surveillance gap which, independent of the others, is fatal to any border search contention: No Customs official observed appellant and the other men cross the border--the period most crucial for border search purposes (M.20,31). That factor alone renders vulnerable a search based on less than probable cause, for it is clear that surveillance at the time of entry into the United States is necessary in order for a valid border search to be found. See, e.g., Leeks v. United States, supra at 471 and King v. United States, supra at 816, quoted, respectively, in footnotes 3 and 4 of this brief.

Moreover, it is clear that in the present case the Customs officials not only lacked the required actual knowledge of a border crossing, but did not even possess probable cause to believe that such a crossing occurred: the informant did not disclose to the officials any underlying facts or circumstances that led him to conclude that the men had crossed the border, and the indications are that he himself relied on hearsay in so concluding (M.47, 76-77). On those facts, a finding of probable cause of border crossing is plainly precluded. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct.

1509 (1964). (The use of an informer's communications to establish probable cause is discussed in detail in the next section of this brief). And it would, of course, be constitutionally impermissible to sustain on border search grounds a search conducted on "mere suspicion" that a person has crossed the international boundary: condonation of such a practice would drastically dilute the Fourth Amendment rights of American border community residents and visitors, for it would continually subject them to the possibility of detentions and searches at the mere whim of Customs officials. Cf. Carroll v. United States, 267 U.S. 132, 154 (1925);[6] Marsh v.

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[6] "Travelers may be...stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

In addition, a strong showing that a person or his belongings crossed the border should be required because, as this Court has recognized, "the primordial purpose of a search by Customs officers is not to apprehend persons, but to seize contraband property unlawfully imported or brought into the United States." Alexander v. United States, supra, at 382.

United States, 344 F.2d 317, 325 (5th Cir. 1965). Appellant is, of course, assuredly not suggesting that the Customs official would so act; it is suggested only that such a decision would unjustifiably leave open the possibility for such an arbitrary and unchecked exertion of power.

II. Since the Customs officials were not informed of the underlying facts and circumstances which led the informant to conclude that three men had crossed the border carrying marijuana, the subsequent search was not based on probable cause.

Since the Government, at the motion to suppress, recognized that its actions in stopping and searching the vehicle could not be sustained on a border search theory, it attempted to justify its behavior by proving probable cause (M.5). The burden of proving probable cause rests, of course, with the Government, Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960), and it is evident from the record that the burden was not adequately discharged.

In stopping and searching the vehicle in which appellant was riding, the Customs officials relied heavily upon

an informant's conclusion that three persons had contacted a certain individual and had crossed the fence with a bag of marijuana (M.7, 18, 27, 47, 66). And the officials acted on those bare conclusory statements, without inquiring about the basis for the informant's belief. The informant, for instance, never indicated that he even saw the three men at all, let alone that he saw them purchasing marijuana or crossing the fence with it (M.47, 66, 68-70, 76-77). It seems, in fact, that the agents did not think the informant possessed first-hand knowledge of any of those events; the informant seemingly had his own source or sources of information concerning the transaction and the border crossing (M.76-77), and the identity and reliability of those sources--and the means by which they learned of the events--were not disclosed to the officials. As will be demonstrated below, probable cause could not have existed for the search, for an officer is not permitted to use the communication of an informant as an element of probable cause unless he has been informed of--and has evaluated--some of the circumstances underlying the informant's conclusion. Aguilar v. Texas, supra.

Aguilar dealt, of course, with the use of an informant's communication in obtaining a warrant. To insure that magistrates, in determining probable cause, perform their required

neutral and detached fact-finding function instead of in effect delegating that decision to law enforcement officers, the Supreme Court in Aguilar enunciated the following constitutional test:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant...was 'credible' or his information 'reliable'. Otherwise, 'the inference from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime, or as in this case, by an unidentified informant."

378 U.S. at 114-15 (citations omitted).

When a warrant is sought, therefore, "the Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should

not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime." Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245 (1958). And although an affiant seeking a warrant may rely on an informant's hearsay remarks rather than on personal knowledge, the Commissioner's function of evaluating probable cause remains the same, and therefore the affiant must present the Commissioner with sufficient facts to enable the latter to conclude that the informant is a reliable person who has a basis for his conclusion. Aguilar v. Texas, supra; Jones v. United States, 362 U.S. 257, 269, 80 S.Ct. 725 (1960).

Had the Customs officials in the present case sought a warrant to search the Ranchero and its occupants, they undoubtedly would have been turned away for failing to meet the constitutional standards set by Aguilar: their hearsay source was hardly reliable--having given inaccurate and unreliable information 40% of the time in the past (M.72, 76)--and, in any event, they did not know of any underlying facts and circumstances upon which the source based his conclusion.[7]

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[7] And the officers clearly could not have obtained a warrant on the basis of the facts within their personal knowledge--facts apart from the informant's communication.

(continued next page)

Had a Commissioner erroneously issued a warrant to the officials, an appellate court, in reversing, might correctly employ language at least as strong as the following statement in Aguilar:

> "Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on...to show probable cause.' He necessarily accepted 'without

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Although some of those circumstances are concededly slightly suspicious, they are wholly insufficient to meet the high probable cause standard, and, moreover, as the Statement of the Case indicates, the facts and circumstances were generally innocuous and consistent with innocence (e.g., the young men walked in a non-suspicious normal manner through a residential section, etc.).

question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'"

378 U.S. at 113-14.[8] Put another way, since a warrant assuredly would not be forthcoming if an officer-affiant merely said, "I have been incorrect 40% of the time, but I honestly believe X has unlawfully imported marijuana," a fortiori the warrant would not issue if the affiant's belief was derived from a conclusory remark of an anonymous informer of equal unreliability. Jones v. United States, supra, at 269.

The present case differs from Aguilar because the search in question was conducted without a warrant. But certainly the difference is meaningless in terms of legal consequence, because it is established beyond any doubt that the requirements for arresting or searching without a warrant are at least as stringent as the requirements for procuring a warrant, Wong Sun v. United States, 371 U.S. 471, 479-80

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[8]Since in the present case, unlike Aguilar, there is an affirmative indication that the informant did not himself speak with personal knowledge, even stronger reversing language might appropriately be employed.

(1963)[9], Beck v. Ohio, 379 U.S. 89, 96, 85 S.Ct. 223 (1964), and are in fact probably even more stringent. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965).

Although, surprisingly, the majority of one panel disagreed, Smith v. United States, 358 F.2d 833 (D.C.Cir. 1966) (divided court)[10], all other cases considering the issue that have come to counsel's attention have correctly followed

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[9]"Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed."

[10]The majority in Smith felt that Aguilar did not modify Draper v. United States, 358 U.S. 307, 79 S.Ct. 329 (1959), and found sufficient facts present to sustain a finding of probable cause under Draper. But Smith is incorrect in finding Draper unaltered by Aguilar: Draper is modified to the extent that it would permit probable cause to be shown solely by the probable reliability of the informant. Aguilar, in other words, represents a synthesis of Draper (re the reliability of the informer) and Jones v. United States, supra (re the basis for the informer's belief), and both prongs of the test must now be satisfied if an informer's hearsay communication is to be considered as a proper ingredient of probable cause.

But even if Draper remains entirely intact, its high standard was certainly not nearly met in the present case: Draper involved a highly reliable (100%) informant, who provided a wealth of detail in his communications, accurately predicting the suspect's subsequent course of activities, and who, inferably, had personally followed the course of the suspect's activities over a period of time. None of those significant factors are found in the current case.

the guidance of Wong Sun and Beck and have found the Aguilar probable cause standards applicable to non-warrant situations. See United States v. Soyka, No. 31583 (2d Cir., decided Jan. 18, 1968); McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056 (1967); Townsley v. United States, 215 A.2d 482 (D.C.Ct.App.1965); Perry v. United States, 336 F.2d 748 (D.C.Cir.1964); Jackson v. United States, 336 F.2d 579, 580 (D.C.Cir.1964): "Thus the court, in determining probable cause, like the magistrate issuing a warrant, must be informed of the underlying circumstances from which the officers concluded that the informant was credible or his information reliable. And the evidentiary requirements are greater when, as here, a warrant is absent."[11] The Supreme Court recently removed any doubt that might have existed in this area when it applied the Aguilar test to a non-warrant situation. McCray v. Illinois, supra, at 304.

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[11] Giordenello, supra, at 486, warned that a U.S. Commissioner "should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime." In non-warrant cases growing out of informants' communications, the situation is even more severe: Instead of a magistrate accepting the conclusion of an officer, the situation develops into one where both the officer and the district court accept, in effect, the blanket conclusion of an informant.

"The threshold question in this case, therefore," as in Wong Sun, "is whether the officers could, on the information which impelled them to act, have procured a warrant..." Wong Sun v. United States, supra, at 480. We have seen that they unquestionably could not have. The most recent ruling in this area of the law--the Second Circuit case of United States v. Soyka, supra--is also the decision most directly relevant to the case at hand. In Soyka, an informant whose past information had on several occasions proven accurate, telephoned agents of the Federal Bureau of Narcotics and told them that Frank Soyka, whom he described in great detail, lived in Apartment 54 of a certain dwelling and was selling heroin from his apartment. The caller also said Soyka had in the past been arrested on three specified charges and had recently disconnected his phone; after the call, the agents verified that information. The next day, the informant again called and said Soyka at that time had heroin in his kitchen cabinet. The agents then went to Soyka's apartment building for the purpose of verifying the location preparatory to seeking a search warrant. When they approached the floor on which Apartment 54 was located, the door to the apartment opened and Soyka--who matched the informant's description--walked out but then noticed one of the agents and, looking

startled, jumped back to the apartment. Soyka was immediately arrested, and the ensuing search disclosed heroin in his kitchen cabinet.

Reversing Soyka's narcotics conviction, Judge Smith, speaking for himself, for Judge Waterman, and, presumably, for Judge Friendly,[12] recognized that a warrantless arrest must minimally meet the standards for obtaining a warrant, and that "on this record, the agents...could not have constitutionally obtained a warrant for the search of Soyka's apartment, because they were not aware of the underlying circumstances from which their anonymous informant concluded that the narcotics were in Soyka's kitchen cabinet." Slip op. at 1094. And "although probable cause may be based on hearsay testimony, that testimony must be based on the personal observation of the absent witness" or, at least, upon the personal observation of the first link in a chain of reliable informants. Id. at 1096. Soyka's reasoning would clearly call for a reversal in the instant case. Moreover, the case at hand presents in at least two respects a substantially stronger case for

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[12]Judge Friendly dissented, but seemingly concurred on the point in question. Slip op. at 1103.

reversal than did Soyka: (1) the severely suspicious conduct of Soyka was hardly matched by appellant and his companions; (2) the agents in Soyka could almost have inferred that their informant spoke with personal knowledge gained from observation of the premises, see slip op. at 1103-04 (opinion of Judge Friendly), while the agents in the present case assumedly thought their informant derived his information from some other unidentified source.

That a reversal is called for in this case is, no doubt, attributable not to any overstepping on the part of the Customs officials, but rather to the fact that the present structure of the law enforcement system in the area involved is probably geared almost exclusively to border searches, posing problems in those occasional cases where, as here, an arrest or search must fall unless supported by probable cause. When the concept of a border search forms the underpinning of a law enforcement system, there is indeed little reason, in the absence of specific guidance, for any part of that system--officer or informant--to be overly concerned about some of the more technical aspects of the probable cause concept.

Since Customs officials assumedly know, for example,

that a border search will be sustained even if based on a vague or stale communication, Cervantes v. United States, supra, at 353 (dictum), or on a tip from an unreliable informant, Hammond v. United States, 356 F.2d 931 (9th Cir. 1966), they will not ordinarily be concerned with the circumstances underlying an informer's conclusion or with the informer's reliability. Similarly, when a legitimate border search will usually follow his communication, an informant--particularly if his compensation is determined by the number of contraband seizures resulting from his tips[13]--has little to lose and everything to gain by giving voice to rumors and by alerting officials whenever he merely suspects or believes someone to possess contraband--even if his conclusion is based on the fact that "he heard it from someone who knew somebody whose brother had bought heroin..." United States v. Soyka, supra, slip op. at 1096.

The apparent willingness of Customs officials to accept

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[13] See, e.g., the payment provision of 21 U.S.C. §199:

> The Commissioner of Narcotics is authorized and empowered to pay any person, from funds now or hereafter appropriated for the enforcement of the narcotic laws of the United States, for information concerning a violation of any narcotic law of the United States, resulting in a seizure of contraband narcotics, such sum or sums of money as he may deem appropriate...(Emphasis supplied).

the conclusions of their informants without probing into the facts and circumstances underlying those conclusions, is, as we have seen, understandably triggered by the great prevalence of border searches, and is of little consequence when border searches result. But since that same lack of inquiry will lead to reversal in those instances where the resulting search cannot be categorized as a "border search", it would seem that the arrests and searches requiring probable cause could often be upheld if the Customs officials were advised, as a precautionary measure, to ask one simple question of informants who state mere conclusions: "How do you know?" If the response is anything similar to "I have seen," United States v. Soyka, supra, slip op. at 1104 (opinion of Judge Friendly), a later search may well be sustained even if it fails to qualify as a border search. Perhaps the present case is a proper vehicle for providing the necessary guidance.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of conviction be reversed.[14]

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[14] Reversal is clearly the remedy called for. Since a remand

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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would be inappropriate even in a case where the record is unclear concerning what facts the informant communicated, Beck v. Ohio, supra, at 97, the remand technique would be clearly uncalled for where the record shows specifically the absence of a crucial communication.

CERTIFICATE OF SERVICE BY MAIL

I, DAVID B. WEXLER, declare that I served three copies of the attached Brief for Appellant by mail on April 3, 1968, on Jo Ann D. Diamos, Office of the United States Attorney, P. O. Box 1951, Tucson, Arizona 85702.

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